IN THE MICHIGAN SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

MARTIN B. BREIGHNER III &
KATHRYN BREIGHNER,

Plaintiffs/Appellants,

v. **Docket No: 123829**

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC., a Michigan non-profit corporation,

Defendant/Appellee.

BRIEF ON APPEAL - APPELLANTS

ORAL ARGUMENT REQUESTED

Wayne Richard Smith (P20716)
Attorney for Plaintiffs/Appellants
365 E. Main Street
P.O. Box 4677
Harbor Springs, Michigan 49740
231-526-1684

STATEMENT OF QUESTIONS PRESENTED

I. IS THE MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION AN AGENCY OF LOCAL SCHOOL DISTRICTS AND THEREFORE A PUBLIC BODY SUBJECT TO THE MICHIGAN FREEDOM OF INFORMATION ACT?

The Trial Court:	Did not answer
Plaintiffs/Appellants answered:	"Yes."
Defendant/Appellee answered:	"No."
The Court of Appeals answered:	"No."

II. IS THE MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION A BODY CREATED BY STATE OR LOCAL AUTHORITY AND THEREFORE A PUBLIC BODY SUBJECT TO THE MICHIGAN FREEDOM OF INFORMATION ACT?

The Trial Court answered:	Did not answer
Plaintiffs/Appellants answered:	"Yes."
Defendant/Appellee answered:	"No."
The Court of Appeals answered:	"No."

III. IS THE MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION PRIMARILY FUNDED BY OR THROUGH STATE OR LOCAL AUTHORITY AND THEREFORE A PUBLIC BODY SUBJECT TO THE MICHIGAN FREEDOM OF INFORMATION ACT?

The Trial Court answered:	"Yes."
Plaintiffs/Appellants answered:	"Yes."
Defendant/Appellee answered:	"No."
The Court of Appeals answered:	"No."

IV. WHEN A TRIAL COURT DETERMINES AND ORDERS THAT AN ORGANIZATION IS A PUBLIC BODY SUBJECT TO THE FREEDOM OF INFORMATION ACT BUT DOES NOT SPECIFICALLY ORDER THE ORGANIZATION TO MAKE A RESPONSE, IS IT IMPLICIT IN THE ORDER THAT A RESPONSE IS REQUIRED?

The Trial Court answered:	Failed to specifically answer
Plaintiffs/Appellants answered:	"Yes."
Defendant/Appellee answered:	"No."
The Court of Appeals answered:	Was not addressed.

IN THE MICHIGAN SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

MARTIN B. BREIGHNER III &
KATHRYN BREIGHNER,

Plaintiffs/Appellants,

v.

Docket No: 123829

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC., a Michigan non-profit corporation,

Defendant/Appellee.

BRIEF ON APPEAL - APPELLANTS

ORAL ARGUMENT REQUESTED

Wayne Richard Smith (P20716)
Attorney for Plaintiffs/Appellants
365 E. Main Street
P.O. Box 4677
Harbor Springs, Michigan 49740
231-526-1684

TABLE OF CONTENTS

INDEX OF AUTHORITIES

United States District Court Cases:

Statutes and Court Rules:

Treatises:

Secondary Authorities:

Articles:

STATEMENT OF JURISDICTION AND STANDARD OF REVIEW

Jurisdiction is conferred upon this Court, pursuant to M.C.R. 7.301(A)(2) and M.C.R. 7.302, for review of Opinion of the Michigan Court of Appeals by virtue of Leave to Appeal granted November 17, 2003. The standard of review in the context of a summary disposition motion is de novo. Herald Co. v Bay City, 463 Mich 111, 614 NW2d 873 (2000).

STATEMENT OF QUESTIONS PRESENTED

I. IS THE MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION AN AGENCY OF LOCAL SCHOOL DISTRICTS AND THEREFORE A PUBLIC BODY SUBJECT TO THE MICHIGAN FREEDOM OF INFORMATION ACT?

The Trial Court answered:	"Yes."
Plaintiffs/Appellants answered:	"Yes."
Defendant/Appellee answered:	"No."
The Court of Appeals answered:	"No."

II. IS THE MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION A BODY CREATED BY STATE OR LOCAL AUTHORITY AND THEREFORE A PUBLIC BODY SUBJECT TO THE MICHIGAN FREEDOM OF INFORMATION ACT?

The Trial Court answered:	"Yes."
Plaintiffs/Appellants answered:	"Yes."
Defendant/Appellee answered:	"No."
The Court of Appeals answered:	"No."

III. IS THE MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION PRIMARILY FUNDED BY OR THROUGH STATE OR LOCAL AUTHORITY AND THEREFORE A PUBLIC BODY SUBJECT TO THE MICHIGAN FREEDOM OF INFORMATION ACT?

The Trial Court answered:	"Yes."
Plaintiffs/Appellants answered:	"Yes."
Defendant/Appellee answered:	"No."
The Court of Appeals answered:	"No."

IV. WHEN A TRIAL COURT DETERMINES AND ORDERS THAT AN ORGANIZATION IS A PUBLIC BODY SUBJECT TO THE FREEDOM OF INFORMATION ACT BUT DOES NOT SPECIFICALLY ORDER THE ORGANIZATION TO MAKE A RESPONSE, IS IT IMPLICIT IN THE ORDER THAT A RESPONSE IS REQUIRED?

The Trial Court answered:	Failed to specifically answer
Plaintiffs/Appellants answered:	"Yes."
Defendant/Appellee answered:	"No."
The Court of Appeals answered:	Was not addressed.

STATEMENT OF FACTS

The Michigan High School Athletic Association (MHSAA) was founded in 1924 to exercise control over the interscholastic athletic activities of all schools in the State of Michigan through agreement with the State Superintendent of Public Instruction.

From 1924 to 1972, the MHSAA was a part of state government, assisting first the Superintendent of Public Instruction, and after 1965, the State Board of Education which was empowered by the statutes then in effect to supervise and control interscholastic athletics. (Act 269, P.A. 1955, Section 784 (since repealed) and M.C.L. 388.1014).

In 1972, the legislature transferred authority over interscholastic athletics to local school boards and provided that the MHSAA was the official association of the state for the purpose of organizing and conducting athletic events, contests, and tournaments among schools and responsible for the adoption and enforcement of rules relative to the eligibility of athletes for participation in interscholastic events, contests, and tournaments. (M.C.L. 380.1292(2)). In addition to this official designation by the legislature as the official state association for secondary school athletics, a representative of the State Board of Education was required to be a member of the governing board of the MHSAA (M.C.L. 380.1292(1)). In the same year (1972), the

MHSAA was incorporated as a Michigan non-profit membership corporation, its stated purpose being:

> *"To create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state consistent with educational values of the high school curriculum, the interest in the physical welfare and fitness of the students participating therein by giving the opportunity to participate in athletics designed to meet the needs and abilities of all and to make and adopt such rules and regulations and interpretation thereof to carry out the foregoing and to further provide for the training and registering of officials and to publish and distribute such information consistent therewith and to do any and all acts and services necessary to carry out the intent hereof." (Articles of Incorporation filed April 18, 1972)*

In 1995, the legislature removed the MHSAA's designation as the "official agency" of the state for the regulation and control of school athletics, but explicitly provided that local school districts could "join organizations as part of performing the function of school districts" (M.C.L. 380.11a(4)), attempting to effectively prevent a local school district, by joining the MHSAA, from committing an *ultra vires* act.

The vast majority of the members of the MHSAA are public school districts (Answers to Requests to Admit No. 2, Appellants' Appendix Page 14a) and the members control the Association through their elected representatives to the Representative Council. Of the eighteen members of the Representative Council at the time this action was filed, sixteen are public school employees. Of the two remaining, one is the appointed designee of the Superintendent of Public Instruction and the other is the Director of Physical Education for the Archdiocese of Detroit

representing "Private and Parochial Schools". (See MHSAA Bulletin Volume LXXVII No. 4, Page 267, Appellants' Appendix Page 33a). Obviously, the MHSAA is collectively and predominantly controlled or owned by public institutions. Most significantly, **MHSAA member schools control its policies, conduct and actions.** (Admitted by the pleadings, Appellants' Appendix Pages 7a (8) and 12a (8)). This should not even be an issue although the majority of the Court of Appeals held that "*...no one school district, or even all the school districts taken and considered as a whole, have the ability or right to control the actions of the MHSAA ...*" With respect, this is a statement belied by the pleadings. Control was never an issue.

95% of MHSAA revenues come from its member schools, (Appellants' Appendix Page 26a) the vast majority of which are public schools (Appellants' Appendix Pages 6a and 11a).

Public school employees are elected to serve on the "Representative Council" which acts as a board of directors overseeing all functions of the MHSAA. Public school employees who wish to serve on the Representative Council must have approval from their principal or local school district superintendent.

The State Superintendent of Public Instruction or his designee is an *ex officio* member of the Representative Council. (Appellants' Appendix Pages 7a and 12a).

The MHSAA is the only interscholastic athletic association in the State of Michigan. It is owned by its member

institutions. If a secondary school wishes to participate in interscholastic meets, contests, or tournaments, or other athletic events between schools, it, practically, must be a member.

Annually, the governing boards of member schools are required to adopt a "Membership Resolution" (Appellants' Appendix Page 31a) which states that "Each Board of Education/Governing Body that wishes to host or participate in (MHSAA sponsored) meets and tournaments must join the MHSAA." (See also Appellants' Appendix Page 12a).

In a very real sense, the MHSAA has a *de facto* monopoly over interscholastic sports in Michigan. It is the "only game in town". While a local school district has the power to disregard the MHSAA policies or rules and the legal authority to opt to leave the Association altogether, these are not realistic options and exist only on paper. Any local school district, not a member of the MHSAA, would, as a practical matter, be virtually unable to participate in any interscholastic sports activities. What athletic director is going to jeopardize his program by booking an athletic event with a Michigan school that is a non-member of the MHSAA? If a local school district wants its students to participate in interscholastic athletics, it must deal with the state designated body that governs interscholastic athletics, the MHSAA. There is no alternative.

The public or private character of the MHSAA may have changed over the years, but not its monopolistic status as

originally created by the legislature. The local school boards now, by law, have control over interscholastic athletics but have, in practical effect, delegated to the MHSAA the same authority and control that was earlier bestowed upon the MHSAA by the legislature. Effectively, nothing has changed.

MHSAA is a membership corporation, admittedly owned and controlled by its members, who are predominately public school boards which, of course, are public bodies. (Appellants' Appendix Pages 14a, 27a, 7a(8), 12a(8), 14a).

An editorial in the Jackson Citizen-Patriot on March 25, 2001, reprinted by the MHSAA in its 2001 MHSAA Girl's Soccer Finals Program (Appellants' Appendix Page 34a) states the relationship quite succinctly:

> *"There is a huge misconception of what the MHSAA is. It is not a controlling legal authority, a 300 pound gorilla, if you will, imposing its will on the schools.* ***THE MHSAA IS THE SCHOOLS.*** *" (Emphasis added)*

Most MHSAA revenues come from its sponsorship of interscholastic athletic tournaments. (Appellants' Appendix, Page 15a). As stated by MHSAA counsel to the trial judge, the school where a tournament is held sells the tickets to the games, collects the money and remits a portion of the net receipts to the MHSAA, after deducting costs for the referees, janitors, and other overhead. MHSAA provides no services other than fixing the ticket prices. No services per se are rendered by MHSAA for its "cut of the take" at an individual tournament. (Appellants' Appendix Pages 22a and 25a).

The trial court found that "a majority of these competitions are held in or on facilities owned by the public schools in Michigan." (Appellants' Appendix Page 41a).

The state, by empowering the local school boards to join the MHSAA and control its activities, allows the MHSAA to support itself by taking funds generated by athletes at local secondary schools paid by supporters of the local schools' athletic programs to see the athletes perform. Significantly, the tournaments and meets are operated and run by the school district hosting the tournament or meet. The only function the MHSAA performs is sponsoring and giving official sanction to the event(s), fixing ticket prices and making eligibility rules with respect to student participation. Essentially, the MHSAA is subsidized by its member schools who operate sanctioned interscholastic tournaments and turn over the lion's share of the gate to the MHSAA.

This case arose after Plaintiffs/Appellants' son, Jordan Breighner, was disqualified from participation in the state ski tournaments. The ostensible reason cited by the MHSAA for declaring Jordan ineligible was that he had earlier participated in a non-MHSAA sanctioned ski race at Searchmont, Ontario and by doing so had exceeded the non-sanctioned race limit for high school ski racers.

Before the race at Searchmont, Jordan's mother, Plaintiff/ Appellant, Kathryn Breighner, had sought clarification from the MHSAA ski coach liaison regarding policies for non-sanctioned ski

races but did not get a response. Neither the Harbor Springs High School Athletic Director nor ski coach had any information on sanctioned or non-sanctioned races. She was given the impression that the race at Searchmont was sanctioned. After the Searchmont race, the coach liaison told Jordan's mother that many races were being "ignored" by MHSAA based upon new **unwritten criteria** used for the first time in this ski season.

Both Jordan and his parents were astonished that after the fact, the race Jordan had skied in was declared by MHSAA to be non-sanctioned, and that as a result, Jordan was ineligible to continue the high school racing season.

Given the fact that MHSAA had failed to communicate the rules regarding outside races for the season and was apparently using non-written criteria to allow many racers extra races, Jordan's parents, to no avail, requested MHSAA to review the particulars of the Searchmont race and rule in favor of the athlete instead of non-existent rules.

Thereafter, on March 5, 2001, Plaintiffs/Appellants made a formal Freedom of Information Act (FOIA) request to the MHSAA for: (Appellants' Appendix Page 10a)

> *"1. Dated information provided to high school ski coaches regarding the 2002 ski season and which races were sanctioned and non-sanctioned. Specifically, we would like to see the December/January bulletin which, according to the 2000-2001 ski manual, lists these events.*
>
> *2. Description of sanctioned and non-sanctioned ski races and copies of dated communications to coaches regarding these descriptions.*

3. *The criteria used to determine which ski races are allowed and which races are determined to be non sanctioned including who will make these decisions.*

4. *a copy of the MHSAA corporate bylaws*"[1]

There was no reply to this formal request. The information requested has never been furnished. It would have imposed no burden on the MHSAA to provide the requested information.

The present litigation commenced on August 31, 2001 and after hearing cross-motions for summary disposition on June 3, 2002 and consideration of the briefs of the parties, the trial court issued its opinion on August 20, 2002. An order was entered on September 4, 2002 granting Plaintiffs' motion for summary disposition.

However, neither the trial court's opinion, nor the order submitted in accordance with the opinion, specifically ordered the Defendant to respond to Plaintiff's written request made pursuant to the FOIA. On September 3, 2002, Plaintiffs' counsel submitted a letter to the trial judge suggesting that the proposed order be amended by the Court on its own motion or in the alternative, Plaintiffs could file a post-trial motion to amend. However, prior to any action being taken by the trial court or by the Plaintiffs, an appeal was immediately filed on September 9, 2002. Because of M.C.R. 7.208(A), Plaintiffs did not file a motion to amend the trial court's order of September 4, 2002, but filed a cross-appeal for the purpose of obtaining an

---

[1] All of this information was first requested of the Harbor Springs Public Schools. Plaintiffs/Appellants were advised by the school that none of this information was available.

order on appeal that the trial court's opinion and order implicitly required the MHSAA to respond to Plaintiffs' request for information under the FOIA or in the alternative that on appeal, the Court order the MHSAA to respond.

Oral argument in the Court of Appeals occurred on February 5, 2003 and the Court of Appeals issued its Opinion on March 6, 2003 reversing the Emmet County Circuit Court in a 2-1 decision making the cross-appeal moot.

This Court granted Leave to Appeal on November 17, 2003.

I.

THE MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION IS THE AGENT OF ITS MEMBERS

A public school district is a public body subject to the Freedom of Information Act. "An agency thereof" is also a public body (M.C.L. 15.232(d)(iii)). Plaintiffs/Appellants contended in both the trial Court and the Court of Appeals and contend here that the MHSAA is an agency of all of its member schools collectively and of each member school individually.

To support this contention, it is necessary to examine and analyze the relationship between the MHSAA and its member schools.

The MHSAA was founded in 1924 as a part of State government for a specific purpose: to "exercise control" over the interscholastic athletic activities of all schools of the State. (Communities for Equity v MHSAA, 178 F.Supp.2d 805, 810 (W.D. Mich 2001)).

The MHSAA is no longer a part of state government, having incorporated as a non-profit membership corporation in 1972 for the same purpose as before: to "create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state ..."

The MHSAA exists for one reason only - as a central authority to govern its members, predominantly public schools, in the operation and management of interscholastic athletics to the end that consistency, order and uniformity will prevail in the conduct of athletic contests between schools. The MHSAA is a

useful mechanism for the governance of interscholastic athletics and essential to their success. If for one reason or another the school districts of this state decided to completely disengage in athletic competitions between schools, the MHSAA would cease to exist.

To join MHSAA and thus have the ability to participate in interscholastic meets and tournaments held under MHSAA auspices, a school district must annually adopt a membership resolution which characterizes itself as an "authorization", adopting the rules, regulations and interpretations of MHSAA.

By adopting the resolution, a school board authorizes the MHSAA to make rules, regulations and interpretations that will govern the school board's actions in concert with the other member schools. While a school board inherently and under both case and statutory law enjoys the power to control and regulate interscholastic athletics, by adopting the required MHSAA membership resolution, it authorizes the MHSAA to exercise those powers in its place, providing for a cohesive and comprehensive statewide school athletic system with single oversight.

Brentwood Academy v Tennessee Secondary School Athletic Association, 431 U.S. 288, 12 S.Ct. 924, 148 L.Ed.2d 807 (2001) stands for the proposition that fact-bound inquiry can establish a legal entity's true character, irrespective of an expressly private characterization in statutory law. It is fundamentally similar to the venerable and well-established concept of

"piercing the corporate veil" looking toward substance and not form.

In the instant case, MHSAA's true character may, but does not necessarily make it a "state actor" but that is not important for purposes of the applicability of the FOIA, which embodies a related, but different concept. So, while MHSAA is nominally a private corporation, its true character is that of an agency providing a mechanism by which mainly public schools may engage in interscholastic sport competitions on a consistent, cohesive and uniform basis, regulating athletic competitions among the schools and utilizing their money-making capacity as its own to support its operations.

The present scheme of regulation was developed, possibly, in accordance with Attorney-General Opinion No. 4795 of August 11, 1977. This opinion states that the regulation of interscholastic athletics may not be delegated to the MHSAA, that interscholastic athletics are a part of the governmental function of a school district and the regulation thereof may not be delegated to a private association or corporation but that boards of education of school districts may join an athletic association and voluntarily adopt the rules of the association as long as enforcement of the rules remains the responsibility of each board as to the schools within its jurisdiction.

This Attorney General Opinion is consistent with Michigan law as developed over the years by this Court.

In 1914, Waterman-Waterbury Co. v School District No. 4 of Cato Township, 183 Mich 168, 150 NW 104 (1914), held that *"School districts are municipal corporations."*

In 1957, in Richards v Birmingham School District, 348 Mich 490, 83 NW2d 643 (1957), this Court (at Page 506) explained:

> *"School districts organized under the statutes of this State are created for the specific governmental purpose of carrying out the Constitutional powers and duties vested in the State legislature with reference to education and the maintenance of common schools and institutions of higher learning...(Page 509)...the defendant school district maintains a physical education department as a part of its facilities and in connection therewith fosters and promotes athletics.... This is done in accordance with regulations of the State department of education and as a part of the educational program of defendant school district. It is not disputed that such activities have a proper place in education and in the physical and mental development of students ... It may not be said that defendant district, in allowing athletic competition with other schools is thereby engaging in a function proprietary in nature. On the contrary, it is performing a governmental function vested in by law."*

Thus, interscholastic athletics are a part of the governmental educational function vested in school districts by law and the supervision and control of interscholastic contests are in the boards of education of each school district in this State.

This Court has also consistently held that governmental powers may not be conferred upon or delegated to a private person or body. For example, in Coffman v State Board of Examiners in Optometry, 311 Mich 582, 50 NW2d 322 (1951), it was held that the legislature could not delegate to the international association

of boards of examiners in optometry the rating of optometric schools or colleges.

And in the Senate of the Happy Home Clubs of America v Board of Supervisors of Alpena County, 99 Mich 117, 57 NW 1101 (1894), this Court stated that, *"It is not in the province of the Legislature to delegate to private corporations the power to make laws for the discharge of offenders."*

It plainly follows then that public school districts in Michigan have no legal right to delegate their power and authority over interscholastic athletics to a private independent body, which the MHSAA claims to be.

If the school districts do not have the ability to delegate their authority over sports and sporting events to the MHSAA, then by joining the MHSAA and contracting with it to perform athletic oversight functions, the MHSAA must be an agency of its member schools. Its members govern the MHSAA by means of a board of directors selected by the members. The MHSAA is inseparable from the school districts of which it is comprised. While the schools have the primary right and authority to make their own rules and regulate athletic conduct, those school districts choosing to join MHSAA authorize it to act for them in the performance of some, but not all, of their athletic functions. The purpose of the MHSAA existing as a central authority is for consistency and order in the conduct of athletic contests between schools. The schools contract with an organization which they control through the democratic process.

The MHSAA cannot have it both ways. Either the local school districts have delegated their legal authority to the MHSAA or the MHSAA is acting as the schools' agent. Either way, the MHSAA is carrying on a public function for the local schools.

Fundamental principles of agency law apply to the relationship between the MHSAA and the schools. In Burton v Burton, 332 Mich 326, 51 NW2d 297 (1952), this Court quoted from 2 CJS 1025 in defining the agency relationship:

> *"An agent is one who acts for or in the place of another by authority from him; one who undertakes to transact some business or manage some affairs for another by authority and on account of the latter and to render an account of it. He is a substitute, a deputy appointed by the principal with power to do the things which the principal may or can do."*

It is submitted that the MHSAA acts as an agent for its members by virtue of the membership authorizing resolution reproduced in the Appellants' Appendix at Page 31a.

As stated in St. Clair Intermediate School District v Intermediate Education Association/MEA, 458 Mich 540, 581 NW2d 707 (1998) from the Restatement of the Law of Agency:

> *"an agency relationship arises only where the principal 'has the right to control the conduct of the agent with respect to matters entrusted to him.'"*

The Court of Appeals' determination in the instant case that no agency relationship exists between the school districts and the MHSAA was based solely upon that Court's belief that the school districts collectively do not *"have the ability or right to control the actions of the MHSAA ..."*

Inasmuch as the MHSAA admitted in the pleadings in this case that *"Defendant's members control the policies, conduct and actions of Defendant"*, control is not an issue; it has been admitted.

This has been admitted in the pleadings because the MHSAA must recognize that member schools control the MHSAA by a representative council, elected or appointed by the member schools. The MHSAA manages interscholastic athletics for the schools and acts for and represents a member in its interscholastic athletic relationships with all other members.

Further, the MHSAA seems to recognize its symbiotic relationship with the schools in its public statements. As reproduced by the MHSAA in one of its programs, **"THE MHSAA IS THE SCHOOLS."**

The majority Court of Appeals opinion holding that the schools had no right of control over MHSAA either individually or collectively and thus MHSAA could not be and was not an agent of the schools, if accepted, means that the MHSAA is truly a **"controlling legal authority, a 300 pound gorilla ... imposing its will on the schools"** enjoying illegally delegated governmental power and accountable to no one.

This characterization seems to be specifically rejected by the MHSAA's endorsement of the statement that **"MHSAA IS THE SCHOOLS."**

An organization representing a group of public bodies formed for the exclusive purpose of carrying out important functions of

those public bodies and acting on behalf of those public bodies through the representatives of those public bodies is necessarily a public body itself.

II.

THE MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION IS A CREATURE OF ITS MEMBERS

An organization "created by state or local authority" is subject to the Michigan FOIA. (M.C.L. 15.232(d)(iv)).

"The MHSAA is the schools". The vast majority of its members are public school districts and the overwhelming majority of the persons comprising its governing "representative council" are public school employees.

The local school districts now allow the MHSAA to exercise much of the same authority which was once bestowed upon local school districts by the legislature pursuant to Act 2, P.A. 1972, Section 379 (since repealed). This is exactly the same authority which the legislature had previously bestowed upon the MHSAA directly without the intercession of local school boards in the year 1924 when the MHSAA was founded to *"exercise control over the interscholastic athletic activities of all schools of the state through agreement with the Superintendent of Public Instruction"*.

In Kirby v MHSAA, 459 Mich 23, 585 NW2d 290 (1998) this Court, in Footnote 17, made it plain that:

> *"The MHSAA is an association of Michigan high schools. Thus* ***it is a creature of its members,*** *with no independent authority over schools or students. The schools can and should exercise appropriate oversight of the MHSAA ..." (Emphasis supplied)*

A "creature" is defined by Webster's New World Dictionary as *"anything created, animate or inanimate"*. "Create" is defined by Black's Law Dictionary 7th Edition as *"to bring into being, to*

cause to exist ...". While the MHSAA in its "present incarnation" may not be state created, it most certainly has been school board created. The schools have caused it to exist and are its only reason for existing.

Here too, is this Court's recognition that the MHSAA has "no independent authority over schools or students" and thus assuredly is under the control of the schools.

The simple syllogism is: MHSAA is a membership corporation. The vast majority of its members are public school districts. Public school districts are local authorities. It, therefore, follows that as a "creature" of its members, MHSAA is a body created by local authority within the meaning of the Freedom of Information Act (supra). The MHSAA is a *de facto* public body because it is held by its members collectively and the conduct of its business impacts all interscholastic high school athletic functions in the state.

Any other interpretation circumvents the declared intention of the FOIA which is, that all persons are entitled to full and complete information regarding the official acts of those who represent them as public officials and public employees. (FOIA Section 1 (2)).

While MHSAA employees are *technically* not public employees, they are *de facto* public employees because they in reality work for an organization which is held and controlled by public authorities.

Appellee will cite, as it has in the past, Perlongo v Iron River Cooperative TV Antenna Corporation, 102 Mich App 433, 332 NW2d 502 (1983), as authority for the broad proposition that a private non-profit non-stock membership corporation *ipso facto* can never be a creature of a local authority. Such reliance is misplaced.

In Perlongo, (supra), the company was formed by four incorporators and some of its members were also members of the Iron River city commission. The corporation was substantially similar to other cable television companies and did not exist to govern the activities or conduct of its members or create, establish, provide for, supervise and conduct any activities of its members. (MHSAA Articles of Incorporation).

Further, its members were not predominantly public bodies and the corporation was not carrying out the authority that the legislature can give and had previously given to a public body.

The purposes of MHSAA and the TV Antenna Corporation are distinctly different. MHSAA was incorporated to serve its members who were and are primarily public bodies to *create, establish, provide for, supervise and conduct interscholastic programs throughout the state ... and adopt rules and regulations and interpretations thereof"* to carry out that mission. The MHSAA was formed to have complete and exclusive regulatory control over interscholastic athletic activities of its members who were and are primarily public bodies. On the other hand, the TV Antenna Corporation was formed to provide cable television

service to the citizens of Iron River and environs who subscribed to its service. It was funded by membership subscriptions and not by "gate receipts from sponsored events" as is the case with MHSAA.

The distinction is crucial. The Court of Appeals' reasoning in Perlongo, (supra), which (correctly in our view) held that a regulated utility operating under a **franchise** from a public body is not in and of itself a public body does not apply to the instant case in which the **"MHSAA IS THE SCHOOLS"**. Certainly, the TV Antenna Corporation is not, was not, and never has been the City of Iron River.

Just because an organization is a not for profit, non-stock, membership corporation does not mean that it cannot be a creature of local authority if its members are primarily local authorities.

As found by the United States Supreme Court in Brentwood Academy v Tennessee Secondary School Athletic Association, (supra), the Tennessee Secondary School Athletic Association (TSAA) was "pervasively entwined" with the state school officials in the association's structure. The nominally private character of the high school athletic association could not insulate it from its public character where a fact-bound inquiry showed that there is *pervasive public entwinement* in the management or control of the organization. An organization that is overborne by the *pervasive entwinement* of public institutions and public officials in its composition and workings has a public character

and is a creature of the public institutions which exclusively utilize it for the governance of certain of their governmental functions. The differences between the Tennessee Secondary School Athletic Association (TSSAA) and the MHSAA are interesting. The Tennessee Association has, from its very inception in 1925, been a private non-profit corporation; it has never had any involvement with the State of Tennessee; it was not originally created by the State; there was no legislation recognizing it until 1972. There is still no state legislation authorizing public schools to join the association - it is accomplished by administrative rule of the Tennessee State Board of Education. Further, the TSSAA actually acts as an enforcer of its rules and regulations, which seems to give it independent authority over schools and students unlike Michigan schools which agree in their authorizing resolution to provide "primary enforcement" of the rules, regulations, interpretations and qualifications made by the MHSAA.

The MHSAA was created, or in the words of the majority of the Court of Appeals, "caused to come into being" for the sole purpose of uniform regulation and governance of secondary school, primarily public school, athletics.

If there were no athletic competition between schools, there would be no need for a high school athletic association.

While participation is "voluntary", as a practical matter, no school can expect to compete with other schools unless it is a

member of MHSAA. The most integral component of the MHSAA composition and workings is the public schools.

Perhaps an inquiry into the reasons for the incorporation of the MHSAA in 1972 after nearly 50 years as a state or quasi-state agency created by the legislature and as to who actually incorporated the organization would be illuminating.

It would not be entirely out of line to suggest that the entire exercise was designed to attempt to avoid the applicability of federal and state law to the organization by creating insulating layers of responsibility, setting up a "straw dog" so to speak.

Whatever the reasons, the responsibility to provide information to the public in the first instance is with the schools. They must not be allowed to avoid their responsibility by allowing a private organization to make the rules, regulations, interpretations and qualifications governing their student athletes in secret and then refuse to tell the public about them.

The public cannot obtain information from the local school district as to, for instance, the criteria used to determine if a race is sanctioned or not because the local school districts have bestowed that function on the MHSAA and the MHSAA develops that criteria and has control of that information. It can and should favor an inquiring member school district with that information but it certainly did not favor these Appellants, inquiring members of the public, who had prior to requesting the

information from the MHSAA, requested it from the Harbor Springs School District who replied that it did not have this information.

To summarize, for the MHSAA to promulgate the fiction that a private non-profit non-stock membership corporation composed primarily of public bodies and performing governmental functions for those public bodies is not itself a public body is pure sophistry. It is nothing more than an attempt to avoid responsibility to the public and the student athletes themselves.

III.

THE MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION IS PRIMARILY FUNDED BY ITS MEMBERS

An organization is subject to the Michigan FOIA if it is primarily funded by or through state or local authority. M.C.L. 15.232(d)(iv). The questions are: Does the MHSAA receive its revenues "by or through" the schools; and if so, are these funds in the nature of fees for services?

The MHSAA obtains most of its income from sponsoring athletic tournaments in which the local school districts participate.

The State of Michigan, through the legislature and the local school districts, allows the MHSAA to take funds which are generated by local school district athletic programs from the local school districts. The MHSAA is taking local school district funds which supporters of the local school district pay to see local athletes perform.

For this money the MHSAA does not even perform the service of operating the tournaments; (with the possible exception of state finals and semi-finals). The local school district which is hosting the tournament handles all of these arrangements. The local school districts put on the tournaments, collect for ticket sales, and then turn over the bulk of the receipts to MHSAA.

The majority opinion of the Court of Appeals stated as fact that, *"The MHSAA sells its own tickets for its own events where member schools take part in tournaments. At best, the*

participating schools in select tournaments collect ticket revenues in what we view to be a 'limited servicing' capacity."

The majority then stated that, *"this arrangement does not constitute direct or indirect funding on the part of the schools."*

There was nothing in the record before the trial court indicating that the MHSAA sells its own tickets for its own events. On the contrary, at oral argument in the trial court, counsel for the MHSAA stated that the MHSAA prints the tickets and fixes ticket prices, but the indication was that tickets are sold at the site of the tournament and the money collected there. (Appellants' Appendix Page 22a) As an example of how the mechanism operates, the Court in Communities for Equity v MHSAA, 178 F.Supp.2d 805 (W.D. Mich 2001), found as fact that in 1997 Rockford High School hosted a regional football playoff which grossed $14,948 in admissions and that 82% of this gross, or $12,208, was remitted to the MHSAA.

The money that supports the MHSAA is generated by the performances of primarily public school student athletes. As succinctly stated in the trial court's opinion:

> *"Defendant MHSAA does not receive funding from the schools in the form of fees for services rendered. Instead the vast majority of the funding of Defendant comes from the gate receipts of the athletic tournaments it sponsors. Discussing the substantially identical arrangements in the State of Tennessee (fn: In pleadings filed in the Communities for Equity case, Defendant has admitted that the 'nature and function of the MHSAA is virtually identical to that of the TSSAA), the United States Supreme Court distinguished the arrangement from a fee for service arrangement as follows:*

'A small portion of the Association's revenue comes from membership dues paid by the schools and the principal part from gate receipts at tournaments among the member schools. Unlike mere public buyers of contract services, whose payments for services rendered do not convert the service providers into public actors...the schools here obtain membership in the service organization and give up sources of their own income to their collective association. The Association thus exercises the authority of the predominantly public schools to charge for admission to their games; ***the Association does not receive this money from the schools but enjoys the schools' moneymaking capacity as its own.'*** *Brentwood Academy v Tennessee Secondary Schools Athletic Association, (2001) 531 U.S. 288; 12 S. Ct. 924; 148 L Ed2d 807 (Emphasis added)"*

The tournament gate receipt funding of the MHSAA results from agreements whereby schools, predominantly public schools, allow the MHSAA to enjoy the schools' moneymaking capacity as its own. This Court has determined that interscholastic athletics are part of the governmental educational function vested in school districts by law and the supervision and control of interscholastic contests are in the board of education of each of the school districts of the state. Richards v Birmingham School District, (supra).

Schools have the capacity and ability to make money by allowing their student athletes to engage in interscholastic athletic tournaments. This is money that is generated by the schools and is money that belongs to the schools in the first instance.

The legislature has also empowered the schools to enter into contractual arrangements. (M.C.L. 340.576c). They have the ability to subsidize an organization formed for the purpose of

providing a mechanism for uniformity and governance of athletic competition between schools and do so by adopting an annual membership resolution to participate in interscholastic activities sponsored by the MHSAA. Thus, the schools give up some of their moneymaking capacity to subsidize the MHSAA. As stated in the dissenting opinion in the Court of Appeals: "*...the gate receipts remitted by the schools to the MHSAA are the function equivalent of a grant or subsidy.*"

Kubrick v Child and Family Service of Michigan, Inc., 171 Mich App 304, 429 NW2d 881 (1988), held that a non-profit private corporation which receives less than 50% of its funds from governmental agencies is not "primarily funded" through state or local authority.

The Court of Appeals stated:

> *"We decline to draw a bright line as to what percentage of funding constitutes 'primarily funded'. Instead, we view the instant case and any future case on its own facts to make a determination as to whether the funding in question amounts to primary funding for the purposes of FOIA."*

If the instant case is viewed on its own facts to determine if the funding of MHSAA is primarily funded by local authority, it has been admitted that 95% of MHSAA revenues come from gate receipts from tournaments and meets between member schools the vast majority of which are public schools.[2]

In State Defender Union Employees v The Legal Aid and Defender Association of Detroit, 230 Mich App 426, 584 NW2d 359

---

[2] At oral argument in the trial court, MHSAA counsel stated that "95% of our revenues are derived from gate receipts".

(1998), a non-profit, private corporation established to provide legal services to indigent Detroit residents was held not subject to the FOIA because any monies received from state or local authorities were generated from fee-for-service transactions. The Court of Appeals said that earned fees are simply not a grant, subsidy or funding in any reasonable common-sense construction of those synonymous words. The bargained for exchange of services for money is thus not public funding for FOIA purposes.

In the instant case, no fee-for-service transactions appear. MHSAA receives the bulk of receipts that member schools take in from tournaments and meets run by the member schools under MHSAA sanction pursuant to MHSAA rules. No bargained-for exchange of services for money exists. The money received from the football tournament in Rockford, for example, is not tied directly to any specific service or services provided by the MHSAA and is not earned by the MHSAA for the provision of a service. Nor is the MHSAA providing services to a class of persons and being paid for it by various governmental agencies pursuant to contract. Rather, it makes the rules, regulations, interpretations and qualifications under which its member schools conduct athletic programs. The member schools have control and management of MHSAA through its representative council.

The precise issue addressed in the instant case on this particular point is whether or not a private, non-profit, non-stock membership corporation which receives 95% of its funding

from member-operated school athletic tournament and meet revenues generated by those members (most of whom are public schools) is an organization "primarily funded" by local authority for purposes of the FOIA.

Until now no published decision has addressed this exact issue. Plaintiffs/Appellants, because of the extreme close nexus between the MHSAA and the schools, submit that the compelling answer is in the affirmative. The tournament gate receipt funding of the MHSAA results from the annual membership resolution required to be enacted by the school districts if they are to enjoy membership in the Association. This is what allows the MHSAA to enjoy the money-making capacity of its members as its own. This is a far cry from "fee for service" arrangements such as seen in State Defender, (supra).

The MHSAA has contended that its receipt of tournament gate receipts from sponsored events does not amount to its being "funded" by local authority. This is fallacious because these funds are all:

1. Generated by the local school districts from local athletic events;
2. Collected by the local school districts through the sales of tickets to these events;
3. Required by local school district resolution to be transferred to MHSAA which
4. Uses the money for its operations.

Plaintiffs/Appellants submit that this is local money produced by local authority that is used to support MHSAA

operations. Logic and common sense dictate that this is "funding".

Defendant/Appellee will cite, as it has in the past, Pokorny v Wayne County, 327 Mich 10, 33 NW2d 641 (1948), and Tiger Stadium Fan Club v The Honorable John Engler, 217 Mich App 439, 553 NW2d 7 (1996), as authority for the proposition that the tournament gate receipts required to be turned over to MHSAA by member schools as a condition of membership to pay for MHSAA operations are not "public money". Defendant/Appellee even states that, *"Revenues raised from the sale of tickets to interscholastic athletic events are not converted to public monies because of where the events are played or who the participants are."*

The problem is that tournament gate receipts generated and collected by local school districts are public monies *ab initio*, just as soon as the receipts are collected and deposited into the host school's bank account.

In Pokorny, (supra), the issue was whether or not unclaimed alimony payments and interest thereon was public money. The Michigan Supreme Court stated that such funds were not public money because the Friend of the Court was "merely a depository" having no interest in these funds other than to collect them and to see that eventually, if possible, they go to those parties entitled to them. The court continued:

> *"... public monies mean those funds which are raised by a governmental unit or agency for the conduct of government and for governmental purposes, and not to those funds such as the present, which incidentally*

fall into the hands of some governmental agent, while such agent is performing his lawful functions. These funds were never intended to belong to the county and were held by the plaintiff merely in a fiduciary capacity, not for the benefit of the county, even incidentally, but for the benefit of those parties entitled to them by virtue of appropriate court orders."

Wayne County is certainly not subsidizing those persons entitled to alimony by court order, but is only acting as a pass-through agent for other people's money.

Such is not the case with gate receipts generated and collected by local school districts. These are public funds right from the start and do not incidentally fall into local school district hands to be held in a fiduciary capacity. Further, the schools are not mere pass-through agents because the tournament gate receipts are their own money, derived from ticket sales to persons who wish to see their own athletes perform.

The issue in Tiger Stadium Fan Club, Inc. (supra), was whether or not gaming revenues paid to the State of Michigan pursuant to a court judgment obligating the tribes to pay gaming revenues directly to the Michigan Strategic Fund were state funds. After analysis, the Court of Appeals held:

"We thus conclude that the revenues involved are public funds, not subject to appropriation in that they are gratuitous payments negotiated by the governor and designated for a specific purpose and that the payment of those revenues to, and their disbursement from, the MSF without an act of the Legislature does not violate from the Appropriation Clause."

Similarly, in the instant cases, the tournament gate receipts turned over to the MHSAA by the local schools are gratuitous payments negotiated by the local schools and the

Association, designated for support of MHSAA operations and payable because of the required annual membership resolution. They are public funds generated and collected by public bodies who have agreed to turn them over to the MHSAA to subsidize its operations. This is an outright subsidy resulting from the MHSAA's utilizing the money-making capacity of its members as its own.

The MHSAA is required to comply with the FOIA because it is "primarily funded through state of local authority" under M.C.L. 15.232(d)(iv). It receives 95% of its funding by or through its predominantly public member schools whose student-athletes perform in interscholastic tournaments and meets from which the MHSAA receives most of the money and does little of the work.

IV.

THE MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION MUST RESPOND TO APPELLANTS' FOIA REQUEST

The trial Court's opinion and order held that the MHSAA was a public body and subject to the Freedom of Information Act. On March 4, 2001, Appellants made a formal FOIA request to the MHSAA who failed to respond. Later, this action was filed to have the Court declare that the MHSAA was subject to the FOIA and that Appellants were entitled to a response to their request. The trial court determined that the MHSAA was subject to the FOIA and granted summary disposition to Appellants. Implicit in that determination is a requirement that MHSAA respond to the FOIA request.

If requiring a response to the request was not implicit in the trial Court's opinion and order, upon affirmation of the trial Court's decision, this Court could order the MHSAA to respond to the FOIA request when ruling upon the appeal. (M.C.R. 7.216(1) or (7)).

In any event, if complete relief is to be granted to Plaintiffs/Appellants, it is necessary that Defendant/Appellee be ordered to comply with the FOIA and furnish the requested information. That was the purpose of Plaintiffs/Appellants cross-appeal.

CONCLUSION

This is a case of first impression in Michigan and this Court's decision impacts the one million Michigan secondary school children who annually participate in interscholastic athletics.

The Michigan High School Athletic Association makes the rules, regulations, qualifications and interpretations governing schools and their student-athletes. It will be a tragic injustice to allow it to continue to do so in secrecy.

The Michigan High School Athletic Association, in operating, managing and carrying out important governmental functions for governmental agencies must be accountable to the public and particularly to the student-athletes who can be severely affected by its rulings and interpretations.

While this Court has said: the MHSAA "can and should" be subject to "appropriate oversight" by the schools, that is not good enough when the schools are not given and do not have the necessary information and cannot themselves furnish it to an inquirer.

It is not too much to ask the MHSAA to forthrightly disclose information under its control and within its realm to inquiring persons. Nor would this impose an onerous burden upon that organization.

The courts in Michigan have always been willing to "pierce the corporate veil" and disregard the corporate entity for the protection of corporate shareholders. So should this Court be

equally willing to go behind the MHSAA facade with factual inquiry based on substance, not form or fiction, and pierce the MHSAA veil for the protection of the public because the reality is that the MHSAA is a public body.

RELIEF REQUESTED

Plaintiffs/Appellants respectfully request this Court to reverse the decision of the Court of Appeals, reinstate the order of the Emmet County Circuit Court and order the Defendant/ Appellee to furnish the information heretofore requested under the Freedom of Information Act.

Date: January 2, 2004

Respectfully submitted,

Wayne Richard Smith (P20716)
Attorney for Plaintiffs/Appellants
365 E. Main Street
P.O. Box 4677
Harbor Springs, Michigan 49740
Telephone: 231-526-1684